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FILED
MAY 15 1998
CLERK

No. 97-1515

In the Supreme Court of the United States

OCTOBER TERM, 1997

DISTRICT LODGE 64, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, ETC., ET AL., PETITIONERS

v.

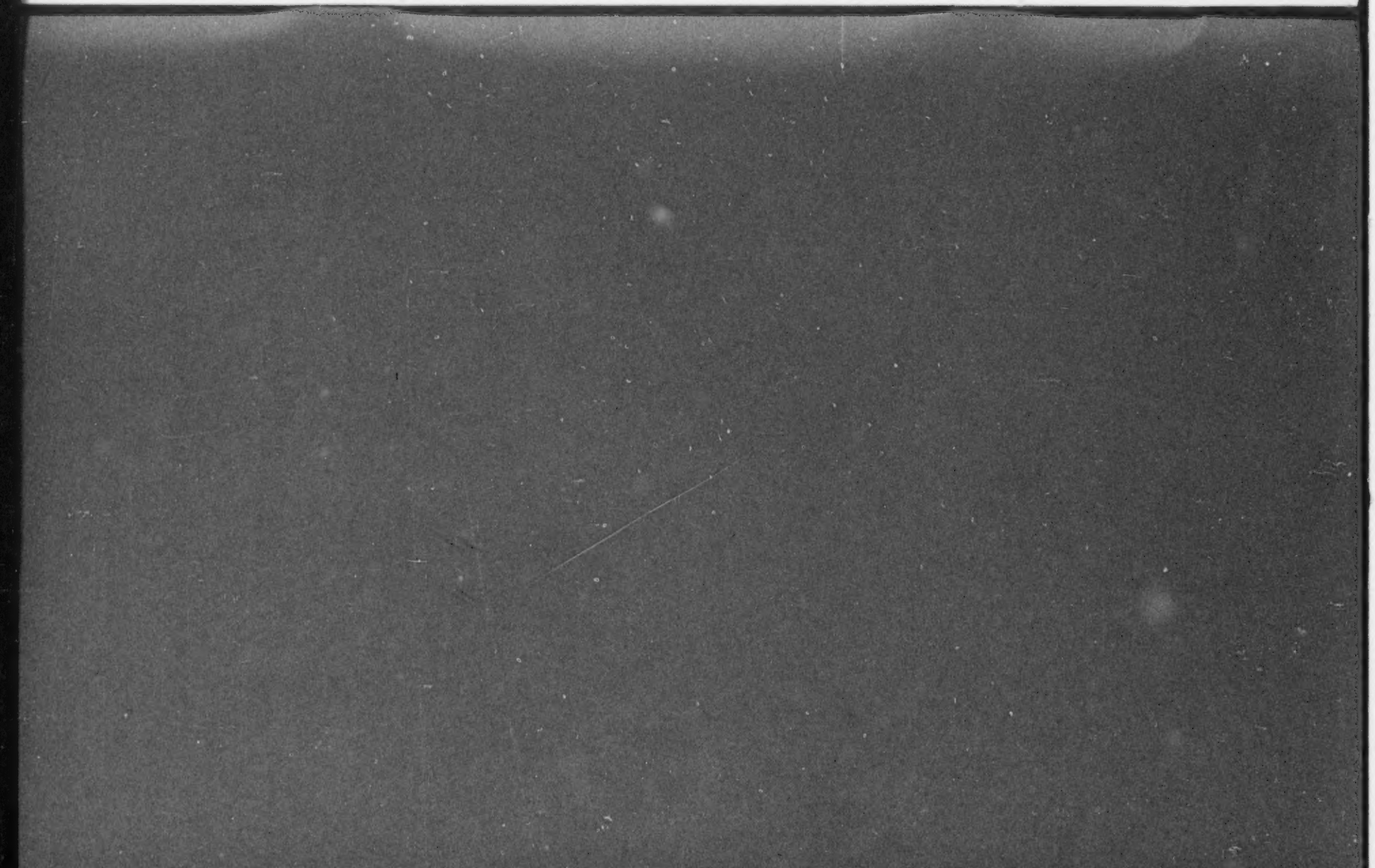
NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that the employer did not fraudulently conceal internal company documents during the General Counsel's investigation of the union's unfair labor practice charge.

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OPINIONS BELOW

The opinion of the court of appeals after the second remand (Pet. App. 1-12) is reported at 130 F.3d 1083. The second supplemental decision and order of the National Labor Relations Board (Board) on remand (Pet. App. 13-21) is reported at 321 N.L.R.B. 924. The opinion of the court of appeals after the first remand (Pet. App. 22-38) is reported at 50 F.3d 1088. The Board's supplemental decision and order on remand (Pet. App. 39-50) is reported at 312 N.L.R.B. 444. The initial opinion of the court of appeals remanding the case to the Board (Pet. App. 51-70) is reported at 949

F.2d 441. The Board's initial decision and order (Pet. App. 71-88) and the decision of the administrative law judge (Pet. App. 89-189) are reported at 299 N.L.R.B. 586.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1997. The petition for a writ of certiorari was filed on March 12, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1981, Brown & Sharpe Manufacturing Company (Brown & Sharpe) was engaged in the manufacture and sale of precision machine tools at two plants in Rhode Island. Pet. App. 95-96. In July 1981, petitioner District Lodge 64, International Association of Machinists & Aerospace Workers, AFL-CIO (Union), asked Brown & Sharpe to begin negotiations for new collective-bargaining agreements. *Id.* at 97.[1] Negotiations began in September 1981. *Id.* at 111. At the bargaining table, Brown & Sharpe took the position that certain of its bargaining proposals were "absolutes," *i.e.*, "provisions that [Brown & Sharpe] had to have" in the new labor contracts; the Union, however, regarded Brown & Sharpe's "absolutes" as constituting a "clear strike issue." *Id.*

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[1] Brown & Sharpe's production and maintenance employees were represented by the Union's Local Lodges 1088 and 1142; the company's clerical employees were represented by the Union's Local Lodge 833. Pet. App. 96-97. Local Lodges 833, 1088, and 1142 were parties to this litigation in the court of appeals (*id.* at 2, 22, 51), and are petitioners before this Court. Pet. 2. Because the nominal distinction among them is not relevant here, we refer to District Lodge 64 and the Local Lodges collectively as "the Union" or "petitioner."

at 116-117.[2] On October 18, the Union began a strike against Brown & Sharpe. *Id.* at 91.

b. On November 5, 1981, the Union filed an unfair labor practice charge with the Board, alleging that Brown & Sharpe had failed to bargain with it in good faith, contrary to Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(1) and (a)(5). Pet. App. 90. On December 28, 1981, after an investigation, the Board's Acting Regional Director dismissed the Union's charge. *Id.* at 91. The Acting Regional Director found "no evidence" that Brown & Sharpe had advanced its "absolutes" to "frustrat[e] or imped[e] the collective bargaining process"; rather, "it appear[ed] from the investigation" that Brown & Sharpe made its proposals "only because of the lawful business consideration of attempting to increase production." *Ibid.* The Union appealed the dismissal of its charge to the Board's General Counsel; on January 29, 1982, the General Counsel denied the Union's appeal. *Ibid.*; see also 29 C.F.R. 102.19(a) and (c).

2. On September 29, 1982, the Union filed a new charge alleging that, prior to the commencement of negotiations, Brown & Sharpe had fired David Waterman, its director of industrial relations, for "refusing to carry out a bargaining position designed to preclude reaching agreement with the Union." Pet. App. 94. Pursuant to a supplemental investigation, the General Counsel obtained the minutes and position papers of Brown & Sharpe's "steering committee," a group of management officials that had

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[2] Brown & Sharpe's "absolutes" involved proposals regarding employee job preference and mandatory employee transfers. Pet. App. 75 & n.3, 114-115.

formulated the company's bargaining strategy. *Id.* at 53, 72, 94. In the General Counsel's view, the steering-committee documents showed that, contrary to its ostensible position at the bargaining table, Brown & Sharpe actually regarded its "absolutes" as "insignificant to [the] operation of its business," and had advanced those proposals to "induce[] the Union to strike." *Id.* at 104.

On September 27, 1983, the General Counsel, relying upon the steering-committee documents, reinstated the Union's previously dismissed charge. Pet. App. 72, 94-95. Based on the reinstated charge, the General Counsel issued a complaint alleging, in part, that Brown & Sharpe had engaged in unlawful "surface bargaining" with the Union "by insisting, without valid economic considerations, on certain proposals as absolute." *Id.* at 72, 84-85.[3]

3. a. The administrative law judge (ALJ) dismissed the General Counsel's complaint as untimely to the extent the complaint sought to reinstate the dismissed charge. Pet. App. 98-108; see also *id.* at 190-208. The ALJ relied on the Board's rule that the General Counsel cannot reinstate a dismissed unfair labor practice charge "outside the 6-month limitations period of Section 10(b) [of the NLRA] absent special circumstances in which a [charged party] fraudulently conceals the operative facts underlying the alleged violation." *Ducane Heating Corp.*, 273 N.L.R.B. 1389, 1390 (1985), enforced mem., 785 F.2d

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[3] "Surface bargaining" occurs when "a party simply attempts to make it appear that it is willing to reach an agreement, although it has no intention to do so." Pet. App. 164.

304 (4th Cir. 1986).[4] The ALJ found that the General Counsel had reinstated the dismissed charge after the six-month limitation period had expired, and that the General Counsel had failed to justify the untimely reinstatement of the charges under the "fraudulent concealment" exception provided by *Ducane*. Pet. App. 107. The ALJ found that there was "no proof that [Brown & Sharpe] committed any fraud" in connection with the General Counsel's investigation of the dismissed charge, *ibid.*; rather, the ALJ noted, "the Union had made the [General Counsel's] field attorney aware of the existence of the steering committee," but the General Counsel's field attorney had "fail[ed] to ask [Brown & Sharpe] for all documents which related to the 'absolutes' or to the steering committee," *id.* at 106.

b. The Board affirmed the ALJ's dismissal order, but on a different ground. Pet. App. 72-85 (*Brown & Sharpe I*). Applying *Ducane*, the Board concluded that, whether or not Brown & Sharpe had fraudulently concealed the steering-committee documents, those documents "do not support the allegation that [Brown & Sharpe] engaged in surface bargaining." *Id.* at 84. Accordingly, the Board found that "[Brown & Sharpe's] failure to disclose them * * * could not amount to a fraudulent concealment of the operative

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[4] Section 10(b) of the NLRA, 29 U.S.C. 160(b), provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." Although Section 10(b) does not directly apply in cases in which a charge is timely filed with the Board but then dismissed, the Board in *Ducane* concluded that it would be appropriate to apply the limitation period of Section 10(b) in such cases.

facts underlying the alleged violation of Section 8(a)(5)." *Id.* at 84-85.

c. The court of appeals affirmed in part the Board's decision in *Brown & Sharpe I*, and remanded the case to the Board for further consideration. Pet. App. 51-70. The court held that "*Ducane* is a reasonable implementation of the policy behind [Section] 10(b)." *Id.* at 54-55.[5] The court concluded, however, that the Board's decision in *Brown & Sharpe I* "le[ft] completely obscure just how significant the facts must be" to constitute "operative facts" within the meaning of *Ducane*'s "fraudulent concealment" exception. *Id.* at 68. Citing *Fitzgerald* v. *Seamans*, 553 F.2d 220, 228 (D.C. Cir. 1977), the court explained that, under its case law, "deliberate concealment of *material* facts" will generally toll a federal-law statute of limitations. Pet. App. 68. Because the Board in *Brown & Sharpe I* had not "explicitly embrace[d] any standard," the court remanded the case for the Board "to explain its application of the fraudulent concealment exception." *Id.* at 55, 68, 70.

4. a. On remand, the Board issued a supplemental decision dismissing the complaint. Pet. App. 39-50 (*Brown & Sharpe II*). The Board explained that it

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[5] The court explained that, because "neither [Section] 10(b) nor any other provision of the Act addresses the issue of time limits on revival of a dismissed charge," the Board "may fill this 'gap' in the statutory scheme pursuant to its authority to implement that scheme." Pet. App. 56-57 (citing *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984)). The court concluded that "*Ducane* reasonably promotes the policy of repose that [Section] 10(b) contemplates," and that "[t]he Board's decision to 'borrow' a fixed period of limitations, rather than to adopt a laches rule, is also within its discretion under the Act." *Id.* at 57-58.

"agree[d] with the *Fitzgerald* standard," and that, by using the term "operative facts" in *Brown & Sharpe I*, the Board had not "intend[ed] to denote a disagreement with the standard of 'material facts.'" *Id.* at 42. The Board also noted that, although it "consistently has applied the equitable doctrine" of fraudulent concealment, it "do[es] not necessarily adopt all the glosses on the fraudulent concealment doctrine set forth by various [f]ederal courts." *Id.* at 40, 41 n.5. The Board found that the steering-committee documents "do not constitute material facts" because "they do not make a critical difference in establishing a violation." *Id.* at 49. The Board therefore concluded that "the alleged concealment of these facts does not toll the [Section] 10(b) period." *Ibid.*

b. The court of appeals vacated the Board's decision in *Brown & Sharpe II* and remanded the case to the Board for further consideration. Pet. App. 22-38. The court concluded that "the allegedly concealed evidence is sufficient to overcome a motion to dismiss, because the documents contain statements that certainly support a claim of surface bargaining." *Id.* at 36. Accordingly, the court held, the documents constituted "material evidence for purposes of the *Ducane* rule." *Id.* at 37. The court therefore remanded the case to the Board "for a determination of whether the evidence, though material, was actually fraudulently concealed." *Ibid.*

5. a. On remand, the Board issued a second supplemental decision dismissing the complaint. Pet. App. 13-21 (*Brown & Sharpe III*). A majority of the Board upheld the conclusion of the ALJ in *Brown & Sharpe I* that Brown & Sharpe had not fraudulently concealed the steering-committee documents. *Id.* at 13-15; see

also *id.* at 105-107. The Board explained that, "[i]n order to find that there has been concealment, there must be 'some positive act tending to conceal the cause of action from the plaintiff, although any word or act tending to suppress the truth is enough.'" *Id.* at 15 (quoting *Richards* v. *Mileski*, 662 F.2d 65, 70 (D.C. Cir. 1981)). The Board found that Brown & Sharpe "did not engage in any affirmative act of concealment," and that "[t]here is no indication of 'any word or act' that was designed to suppress the truth from the General Counsel." Pet. App. 15.[6]

The Board explained that, although a finding of fraudulent concealment may be appropriate "where the General Counsel requests or subpoenas certain information and a [charged party] falsely denies that such information exists," or "affirmatively represent[s] that it [is] providing *all* relevant material, while actually withholding certain information," the Board emphasized that "[n]either is the situation here." Pet. App. 16-17. The Board rejected the argument that Brown & Sharpe should be deemed to have engaged in fraudulent concealment "because it did not, on its own initiative, produce an item that was not requested by the General Counsel," concluding that "this view is impractical and would actually hinder the Board's investigatory process." *Id.* at 16.[7]

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[6] The Board found that Brown & Sharpe "voluntarily cooperated" with the General Counsel's initial investigation, that it "produced, as requested, bargaining notes, correspondence, proposals and counterproposals," and that "[w]hen, during the course of a later investigation, [Brown & Sharpe] was asked for the evidence at issue, it produced that evidence without delay." Pet. App. 15.

[7] Board Chairman Gould dissented, finding that "fraudulent concealment has occurred by virtue of [Brown & Sharpe's]

b. The court of appeals affirmed the Board's decision in *Brown & Sharpe III*. Pet. App. 1-12. The court explained that "[t]he crux of [the Union's] argument is that merely by cooperating with the General Counsel's investigation without divulging all of the information it knew to be relevant, Brown & Sharpe performed an affirmative act of concealment." *Id.* at 9. The court rejected that contention, finding "little question" that substantial evidence supported the Board's determination that "Brown & Sharpe did not intend its participation as a ruse to prevent the Board from finding the steering committee position papers." *Id.* at 9, 10.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Particularly in view of petitioner's repeated concession that "this case is factually *sui generis*" (Pet. 15; see also Pet. 5, 18, 22), further review is not warranted.

1. Petitioner claims (Pet. 3-4, 14) that the Board is not free to develop its own doctrine of fraudulent concealment, but rather must apply that doctrine as it has been developed by the federal courts as a matter of federal common law. That claim is not properly presented and in any event lacks merit.

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withholding of the steering committee documents." Pet. App. 18. Chairman Gould argued that "[t]hat information rested solely with [Brown & Sharpe], and when it chose to affirmatively withhold that information while giving the General Counsel the impression that it was fully cooperating with the rest of the investigation, an affirmative act of concealment took place." *Ibid.*

a. In *Brown & Sharpe II*, the Board indicated that it viewed itself as free to develop its own doctrine of fraudulent concealment. Pet. App. 40, 41 n.5. At no point during the further proceedings before the Board did petitioner contend to the contrary. Because petitioner failed to present its claim to the Board, and has not pointed to "extraordinary circumstances" justifying that failure, this Court lacks jurisdiction to consider the claim. See 29 U.S.C. 160(e) ("No objection that has not been urged before the Board * * * shall be considered by the [reviewing] court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."). See also, *e.g.*, *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665 (1982).

Moreover, petitioner did not advance the claim in the court of appeals, and the court of appeals did not pass on it. See Pet. App. 8-9 (court of appeals notes that petitioner did "not contend[] that the Board adopted an erroneous legal standard for fraudulent concealment," but rather contended only that "the Board misconstrued and misapplied this court's precedent when it found that Brown & Sharpe had not fraudulently concealed the steering committee documents"). This Court ordinarily does not consider issues that were not "pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992).

b. Even if it were properly presented, petitioner's claim is without merit. Under the NLRA, Congress conferred on the Board "the authority to develop and apply fundamental national labor policy." *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 500 (1978). As it exercises that authority, the Board is not bound by "canons for equitable relief deemed suitable by chancellors in ordinary private controversies." *Phelps*

Dodge Corp. v. *NLRB*, 313 U.S. 177, 188 (1941). Cf. *NLRB* v. *Town & Country Elec., Inc.*, 516 U.S. 85, 92-94 (1995) (Board's interpretation of statutory term "employee" is entitled to deference even if that interpretation diverges from common-law principles). Indeed, the Board's discretion is especially pronounced where, as here, it is elaborating upon its own case law with respect to a matter that Congress has not specifically addressed. See note 5, *supra*. Thus, the Board would be well within its authority if it were to conclude that "industrial relations policy favoring finality in the resolution of labor disputes" justified adoption of a relatively restrictive approach to the circumstances in which fraudulent concealment would permit reinstatement of an unfair labor practice charge that had previously been dismissed. *Truck Drivers & Helpers Union, Local No. 170* v. *NLRB*, 993 F.2d 990, 999 (1st Cir. 1993).

The two cases upon which petitioner relies (Pet. 13-14) are not to the contrary. In *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946), the Court held that principles of equitable tolling were applicable to federal claims sounding in equity. In *DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S. 151 (1983), the Court held that the six-month limitation period in Section 10(b) of the NLRA, 29 U.S.C. 160(b), should be applied to an employee's claims that an employer breached a collective-bargaining agreement and that a union breached its duty of fair representation by mishandling the ensuing grievance. Neither *Holmberg* nor *DelCostello* suggests that the Board would lack authority to develop its own doctrine of fraudulent concealment to determine the circumstances in which it would be appropriate to

permit the reinstatement of an unfair labor practice charge that had previously been dismissed.

c. In any event, the Board in this case did not diverge from the federal common law of fraudulent concealment. In concluding that petitioner had failed to establish fraudulent concealment, the Board relied on *Richards* v. *Mileski*, 662 F.2d 65 (D.C. Cir. 1981) (see Pet. App. 15 & n.6), and adopted an approach consistent with that generally followed by the federal courts. See, *e.g.*, *Pinney Dock & Transport Co.* v. *Penn Cent. Corp.*, 838 F.2d 1445, 1469 (6th Cir.) ("[m]ost of the appellate cases which have addressed the issue in the context of antitrust actions have required * * * affirmative concealment" to establish fraudulent concealment), cert. denied, 488 U.S. 880 (1988); *Volk* v. *D.A. Davidson & Co.*, 816 F.2d 1406, 1415 (9th Cir. 1987) (to establish fraudulent concealment in a federal securities-fraud action, plaintiff must demonstrate "affirmative conduct upon the part of the defendant"); *Taylor* v. *Meirick*, 712 F.2d 1112, 1118 (7th Cir. 1983) (" 'fraudulent concealment' implies active misconduct"). Although petitioner cites several cases that it contends articulate a standard different from the Board's (see Pet. 18), only one of those cases actually addresses the fraudulent-concealment doctrine, and that case supports the Board's conclusion in the present case.[8]

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[8] *Baskin* v. *Hawley*, 807 F.2d 1120 (2d Cir. 1986), addresses fraudulent concealment and applies a test similar to the Board's. See *id.* at 1130-1131 (finding fraudulent concealment based on "evidence of active concealment"); see also *id.* at 1132 (noting "ample evidence of falsehoods and half-truths"). The other cases cited by petitioner describe the elements of various causes of action sounding in fraud, and do not discuss the fraudulent-concealment doctrine. See *Milton* v. *Van Dorn Co.*,

2. Petitioner contends (Pet. 15-16) that "[t]he purpose of equitable tolling is to prevent persons from taking advantage of their own wrongs by concealing potentially valid claims," and that the Board's requirement that there be an "affirmative act" of concealment "entirely defeat[s]" that purpose, because it excludes "common (and myriad) forms of trick, artifice, and contrivance by which an investigator may be misled or deceived." Petitioner's argument is based on a mischaracterization of the Board's decision.

As the Board explained in the present case, "any word or act tending to suppress the truth is enough" to constitute fraudulent concealment. See Pet. App. 15. In a case in which the evidence demonstrates that the charged party misled the General Counsel by "trick or artifice" during the investigation of a union's charge, the Board would be free to find that the charged party had engaged in fraudulent concealment, for such a course of conduct would certainly involve some "word or act tending to suppress the truth." *Ibid.* In the present case, however, the Board found as a factual matter that Brown & Sharpe had not engaged in such conduct respecting the steering-committee documents, and that the General Counsel's investigator had simply failed to ask Brown & Sharpe to produce them. See *id.* at 9-11, 13-15. Although petitioner asserts (Pet. 19) that Brown &

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961 F.2d 965, 968-969 & n.4 (1st Cir. 1992) (describing circumstances in which "duty to disclose may arise" under anti-fraud provision of federal securities law); *Ellis* v. *Zuck*, 409 F. Supp. 1151, 1157 (N.D. Ala. 1976) (describing circumstances in which "liability for nondisclosure or suppression of facts will arise" under Alabama law of fraud), aff'd, 546 F.2d 643 (5th Cir. 1977).

Sharpe's failure to produce the documents unilaterally was "deliberately misleading," the court of appeals' contrary assessment of the evidentiary record raises no issue warranting further review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

3. Petitioner also contends (Pet. 19-21) that the Board would have found that Brown & Sharpe had engaged in fraudulent concealment had the Board not "overlooked the most critical facts," namely, the steering-committee documents and the testimony of David Waterman. According to petitioner, "the court of appeals clearly signalled to the [B]oard in its second opinion that it was to consider those facts in determining whether the company had engaged in fraudulent concealment," but "the [B]oard ignored them." Pet. 20. Petitioner's argument is without merit.

In *Brown & Sharpe II*, the court of appeals examined the steering-committee documents and the affidavit of David Waterman only to determine whether that evidence was material to petitioner's charge of surface bargaining. See Pet. App. 35-37. Having answered that question in the affirmative, the court remanded the case to the Board for a determination "whether the evidence, though material, was actually fraudulently concealed." *Id.* at 37. The court expressed no view on the latter issue. Moreover, the court of appeals in *Brown & Sharpe III* upheld as "unassailable" the Board's "factual determination that there was no affirmative act of fraudulent concealment by the company." *Id.* at 11. That conclusion raises no issue warranting further review. *Universal Camera Corp., supra.*

4. Finally, petitioner asserts (Pet. 4-5, 21-22) that "[t]he tolerance of the court of appeals and the [B]oard for the extinction of the union's rights under the Act is manifestly unjust." Pet. 21. That is so, according to petitioner, because the Board "attribute[d] the dismissal of the union's charges exclusively to the investigatorial misfeasance of the General Counsel," Pet. at 5, and under *NLRB* v. *J.H. Rutter-Rex Manufacturing Co.*, 396 U.S. 258 (1969), "the consequences of the [B]oard's misfeasance should not be visited on innocent parties," Pet. 22. There is no merit to petitioner's contention.

As the court of appeals explained, "the consequence of a statutory scheme that empowers only the General Counsel to issue complaints is that some party must bear the risk of negligence on the part of the General Counsel's office." Pet. App. 11-12; see also 29 U.S.C. 153(d). Thus, "[i]nvestigative foul-ups by the General Counsel necessarily burden one party or another (the charging party under *Ducane*, the charged party under its opposite); neither inequity is necessarily greater than the other, and it is within the Board's discretion to strike the balance as it has." Pet. App. 12 (quoting *id.* at 67).

Contrary to petitioner's suggestion (Pet. 22 & n.16), the court's conclusion is not inconsistent with *Rutter-Rex*, *supra*. In *Rutter-Rex*, the Court held that, when computing backpay awards to remedy unfair labor practices, "the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers." 396 U.S. at 265. In the present case, however, Brown & Sharpe has not been found to have violated the NLRA, and therefore it is not in the position of a "wrongdoing employer."

Moreover, while the Court held in *Rutter-Rex* that the Board is not *required* "to place the consequences of its own delay * * * upon wronged employees," the Court did not conclude that the Board would lack authority to adopt such a policy in appropriate circumstances. *Ibid.* As this Court has explained in a different context, "[t]he ultimate problem is the balancing of the conflicting legitimate interests," and "[t]he function of striking that balance * * * is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *Beth Israel Hosp.*, 437 U.S. at 501 (quoting *NLRB* v. *Truck Drivers*, 353 U.S. 87, 96 (1957)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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